

**U.S. Department of Labor**

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**Issue Date: 20 March 2006**

**CASE NO.: 2005-LHC-00024**  
**OWCP NO.: 01-150269**

In the Matter of

**RICHARD STETZER**  
Claimant

v.

**LOGISTEC OF CONNECTICUT, INC.,**  
Employer

and

**SIGNAL MUTUAL INDEMNITY ASSOCIATION**  
Carrier

**APPEARANCES:**

David A. Kelly, Esquire, Monstream & May, Glastonbury, Connecticut, for the Claimant

Peter Quay, Esquire, Murphy & Beane, New London, Connecticut, for the Employer and Carrier

**BEFORE:** Colleen A. Geraghty  
Administrative Law Judge

**DECISION AND ORDER AWARDING BENEFITS**

**I. Statement of the Case**

The present matter involves a claim for compensation benefits arising under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "Act"). The case is in an unusual posture as the Claimant seeks enforcement of a prior decision and order awarding compensation benefits under the Act. On July 8, 2000, Richard Stetzer, the Claimant ("Claimant"), initially filed a claim against Logistec of Connecticut, Inc. ("Employer")

and Signal Mutual Indemnity (“Carrier”) after suffering a back and right hand injury. On August 11, 2003, Administrative Law Judge Daniel Sutton of the Office of the Administrative Law Judges (OALJ) issued a Decision and Order holding that the Claimant’s average weekly wage at the time of injury was to be calculated pursuant to Section 10(c) of the Act. (November 7, 2003; No. 2001-LHC-03116), CX 6 at 3-5. Judge Sutton also awarded the Claimant temporary partial disability compensation under Section 8(e) of the Act from May 31, 2000 through March 28, 2002 based upon an average weekly wage of \$1489.80 for a total amount of \$5,834.17 for this period. CX 6 at 12.<sup>1</sup> Judge Sutton’s decision provided further that the award of temporary partial disability compensation was to continue beyond March 29, 2002 for a period not to exceed five years at a rate equal to two-thirds of the difference between the Claimant’s actual earnings and those received by a comparable employee, Daniel Haggerty, plus interest on all unpaid compensation. CX 6 at 13-14.

The Claimant appealed the Order to the Benefits Review Board (BRB) challenging the method by which Judge Sutton calculated the average weekly wage at the time of injury. CX 7 at 2. On August 20, 2004, the BRB reversed Judge Sutton’s decision and held that the average weekly wage was to be calculated using Section 10(a) of the Act given the Claimant’s work history in the year prior to his injury. CX 7 at 3-4. The BRB awarded the Claimant temporary total disability benefits from July 9, 2000 to May 13, 2001 at the rate of 66 2/3 percent based upon an average weekly wage of \$1,248.20 applying Section 10(a) of the Act.<sup>2</sup> The BRB upheld Judge Sutton’s order in all other respects.

On September 20, 2004, the Claimant filed an LS-18 alleging default of the OALJ and BRB Orders with the District Director of the Office of Workers Compensation Programs (“OWCP”). ALJX 1. The District Director did not enter a default and instead, on September 30, 2004, the District Director referred the matter to the Office of Administrative Law Judges for hearing. *Id.*

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<sup>1</sup> The Claimant established that his post-injury earning capacity for the period of May 31, 2000 through March 28, 2002 was \$1,489.80 per week and the earning capacity of a non-disabled employee was \$1,691.39 per week during the same period, for difference of \$201.59 per week. The parties agreed that the difference in earning capacity between the Claimant and the comparable non-disabled employee, Daniel Haggerty, was \$8,751.25 for the period May 31, 2001 to March 28, 2002. Following the Board’s *Stallings v. Newport News Shipbuilding and Dry Dock Co.*, 33 BRBS 193, 195-196 (1999) decision, Judge Sutton awarded the Claimant a lump sum in the amount of two-thirds of the difference between his actual post-injury earnings and what he would have earned had he not been injured for this specific period of time which resulted in a compensation due in the amount of \$5,834.17 for the period May 31, 2001 to March 28, 2002. CX 6 at 12.

<sup>2</sup> The parties stipulated before Judge Sutton that the Claimant was paid temporary total disability compensation benefits from July 9, 2000, the date of the injury, until May 13, 2002 when he returned to restricted duty. CX 6 at 3. The only issue the Claimant appealed was whether Judge Sutton erred in the method he used to calculate the average weekly wage at the time of injury. Having determined that Judge Sutton’s utilization of Section 10(c) to determine the average weekly wage of \$1,046.58 was incorrect, the BRB’s order directs that the correct average weekly wage is \$1,248.20 and the Claimant’s benefits for temporary total disability are based upon 66 2/3 percent of the average weekly wage. CX 7 at 5.

A hearing was held before me on February 14, 2005 in New London, Connecticut.<sup>3</sup> The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer and Carrier.<sup>4</sup> The parties offered stipulations. Documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-8. Hearing Transcript ("TR") 15-16. The Employer's Exhibits ("EX") 1-4 were admitted without objection. TR 17, 20. Thereafter, the parties filed briefs.<sup>5</sup>

Upon review of the parties' briefs, hearing statements and the evidence of record, I conclude that the Claimant is entitled to an award of temporary partial disability benefits based upon two-thirds of the difference between the wages he earned and the wages of Mr. Haggerty, excluding three payments made to Mr. Haggerty on September 17, 2003, February 5, 2004 and October 14, 2004. The Claimant is not entitled to a penalty. My findings of fact and conclusions of law are set forth below.

## **II. Stipulations and Issues**

The parties offered the following stipulations: (1) the Act applies to the claim; (2) the Claimant injured his back on July 8, 2000; (3) the Claimant injured his right hand on July 6, 2000; (4) the injuries arose out of and in the course of his employment at Logistec; (5) an employer/employee relationship existed at all relevant times; (6) the Employer was timely notified of the complaint; (7) the claim for benefits and the notice of controversion were timely filed; (8) the informal conference was held on September 14, 2004. TR 11-13; CX 6 at 3.

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<sup>3</sup> The Claimant seeks enforcement of Judge Sutton's Order. TR 6-10. Section 18 of the Act provides that a default may be entered by the District Director and enforced in the federal district court. 33 U.S.C. § 918. The Office of Administrative Law Judges lacks authority to enforce such decisions. Therefore, I will treat the Claimant's current action as a request for modification under Section 22 of the Act. 33 U.S.C. § 922. Under Section 22 of the Act . . . "any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification because of a mistake in fact or a change in condition." *Wynn v. Clevenger Corp.*, 21 BRBS 290, 292 (1988).

<sup>4</sup> The District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP") did not appear and was not represented.

<sup>5</sup> On April 29, 2005, the Employer filed a Motion to Offer Additional Exhibit after the hearing. The Employer seeks to submit a letter from David Shuda, President of Coastline Terminals of Connecticut, addressing the issue of payment for Mr. Haggerty's service on the board of Coastline Terminals. The Employer argues that the exhibit will assist the administrative law judge to make a determination as to whether the payments in question should be included in the calculation of lost wages. Emp. Mot at 1. The Claimant objects to the admission of the additional exhibit. The Claimant argues that the exhibit the Employer seeks to admit is late and is hearsay which would prejudice the Claimant as he has not had an opportunity to cross examine the author of the exhibit. Cl. Resp. at 1-2. Pursuant to 29 C.F.R. §18.54 the record closes at the conclusion of the hearing unless the administrative law judge directs otherwise. I did not direct that the record remain open at the close of the hearing. Section 18.54 provides further that once the record is closed, no additional evidence is to be accepted into the record absent a showing that new and material evidence has become available which was not readily available prior to the close of the record. The Employer failed to offer an explanation as to why the exhibit it now seeks to admit was unavailable at the time of the hearing or could not have been submitted at the hearing. In the absence of such an explanation, and in view of the Claimant's assertion of prejudice resulting from his inability to cross examine the author of the exhibit, the motion is denied and the exhibit is excluded.

The following issues are in dispute: (1) the amount of the Claimant's lost wages for calculating temporary partial disability benefits beginning March 29, 2002; (2) whether the Claimant is entitled to a penalty under Section 14(f) of the Act.

### **III. Findings of Fact and Conclusions of Law**

#### **A. Background**

The Claimant was injured on July 6 and July 8, 2000 while employed by Logistec and he filed a claim for disability compensation and medical benefits. CX 6. At the hearing on the initial claim before Judge Sutton, the parties stipulated that the Claimant was paid temporary total disability compensation from July 9, 2000 to May 13, 2001 at a rate of \$712.79 per week. The Claimant successfully appealed the method utilized by Judge Sutton in determining the Claimant's average weekly wage at the time of his injury.<sup>6</sup> As noted, the BRB reversed Judge Sutton's decision to the extent that he calculated the Claimant's average weekly wage under Section 10(c) of the Act rather than Section 10(a). CX 7. In all other respects, the BRB affirmed Judge Sutton's decision. CX 7 at 5.

The Claimant returned to work at Logistec on restricted duty on May 13, 2001. CX 6 at 11. Judge Sutton's decision awarded the Claimant temporary partial disability compensation pursuant to Section 8(e) for the period May 31, 2001 through March 28, 2002 in a lump sum. In determining the amount owed for this period, Judge Sutton compared the Claimant's post-injury earning capacity with the earning capacity of a comparable non-disabled employee, Mr. Haggerty, and determined that there was a difference of \$201.59 per week. Two-thirds of \$201.59 results in a compensation benefit of \$135.67 per week over a period of 43 weeks for a total benefit of \$5,834.17 for the period May 31, 2001 through March 28, 2002. CX 6 at 11-13. In addition, Judge Sutton determined that the Claimant was entitled to an ongoing award of temporary partial disability compensation in an amount equal to two-thirds of the difference between the Claimant's actual earnings and the earnings received by the comparable employee, Mr. Haggerty. *Id.* Neither party appealed the award of temporary partial disability benefits.

The Claimant and Mr. Haggerty continue to work at Logistec. EX 1 and 2. The parties agree that Mr. Haggerty continues to be the proper comparable employee whose wages are evaluated in determining the extent of the Claimant's wage loss. TR 7-8.

The Claimant argues that from May 31, 2001 through January 20, 2005, he earned \$138,919.16 and during the same period Mr. Haggerty earned \$180,596.51. CX 1; Cl. Br. at 3.<sup>7</sup> The difference is \$41,677.35 for the 189 week period. The Claimant contends that under Judge Sutton's Order he should have been paid \$27,784.90 ( $\$41,677.35 \div 189 \text{ weeks} = \$220.51$  wage loss and  $2/3$  of \$220.51 results in a compensation rate of \$147.01 per week), but he was paid

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<sup>6</sup> This calculation was used in determining whether the Claimant's temporary total disability compensation payments were based upon the correct average weekly wage at the time of his injury on July 8, 2000. CX 6 at 3-5.

<sup>7</sup> The actual wage records indicate the last wage payment covered the period through January 15, 2005. CX 2.

only \$20,832.56. Cl. Br. at 3-4. The Claimant asserts that this difference of \$6,952.56 is the basis of the current dispute. Cl. Br. at 3.

In contrast, the Employer claims that for the period March 29, 2002 to January 15, 2005, the Claimant earned \$104,104.60 and Mr. Haggerty earned \$122,835.06 over this 146 week period. The difference is \$18,730.46 which is converted to lost wages of \$128.29 per week with a resulting compensation rate of \$85.53 per week. Emp. Br. at 7. In calculating the Claimant's lost wages during the period March 29, 2002 to January 15, 2005, the Employer does not include payments made to Mr. Haggerty of \$6,750 on September 17, 2003, \$4,500 on February 5, 2004, and \$4,500 on October 14, 2004 as Logistec argues that these payments are not clearly identified as wages received from employment at Logistec. EX 2 at 2, 11-12.

The Claimant asserted, and the Employer did not dispute, that Logistec did not pay the Claimant weekly temporary partial disability compensation benefits immediately following Judge Sutton's August 2003 decision. TR 6-7, 21-23. However, on June 23, 2004, the Employer/Carrier paid the Claimant \$14,998.30 representing temporary partial disability compensation for the period March 29, 2002 through June 10, 2004. CX 4. Logistec has also paid temporary partial disability compensation benefits for the period June 11, 2004 to the present based upon a weekly wage loss of \$128.29 resulting in a weekly compensation rate of either \$83.60 or \$85.53. Cl. Br. at 4, Emp. Br. at 4.<sup>8</sup>

#### **B. What Is the Amount of the Claimant's Wage Loss For Calculating The Temporary Partial Disability Compensation Benefit**

As noted above, pursuant to Section 8(e) of the Act, Judge Sutton awarded the Claimant temporary partial disability compensation benefits beginning on May 31, 2001 and continuing for a period not to exceed five years. CX 6 at 14. Judge Sutton awarded a portion of this benefit, the period of May 31, 2001 to March 28, 2002, as a lump sum of \$5,834.17 based upon the evidence presented to him. *Id.* In addition, he ordered that beginning on March 29, 2002 and continuing for the remainder of the five year period, the Claimant was entitled to compensation benefits in an amount equal to two-thirds of the difference between the Claimant's actual earnings and those received by the comparable employee, Mr. Haggerty. *Id.*<sup>9</sup>

A dispute has arisen between the parties as to the amount of ongoing benefits due the Claimant.<sup>10</sup> The crux of the dispute centers upon the calculation of the wages earned by Mr.

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<sup>8</sup> The Claimant asserts that the payments from June 10, 2004 forward were \$83.60 per week. Cl. Br at 4. The Employer asserts that it has made payments in the amount of \$85.53 per week during this period. Emp. Br. at 4. Neither party submitted an LS 208 or other evidence indicating the exact amount of weekly benefits paid during this period.

<sup>9</sup> Pursuant to Section 8(e) of the Act, a claimant may be entitled to temporary partial disability compensation for a period not to exceed five years. 33 U.S.C. 908(e). To the extent that the Claimant's brief can be construed to argue that he is entitled to temporary partial disability for five years beginning on March 29, 2002, the Claimant is mistaken as the Longshore Act limits temporary partial disability compensation payments to a total of five years. Cl. Br. 2.

<sup>10</sup> Judge Sutton's decision awarding the Claimant a lump sum of \$5834.17 in temporary partial disability compensation benefits for the period May 31, 2001 through March 28, 2002 was not appealed. His decision in this

Haggerty, the comparable non-impaired employee, following March 29, 2002 the date that Judge Sutton's decision ordered ongoing benefits to begin. The wage records submitted by the parties establish that the Claimant's wages for the period March 29, 2002 through January 15, 2005 were \$103,752.49.<sup>11</sup> EX 1, CX 1 and 2. It is the wages for Mr. Haggerty for the period March 29, 2002 through January 15, 2005 that are in dispute. The Claimant argues that three payments to Mr. Haggerty totaling \$15,750 (9/17/03 for \$6750, 2/5/04 for \$4500, and 10/14/06 for \$4500) are wages earned by Mr. Haggerty at Logistec and ought to be included in the calculation of his wages for comparison purposes. Cl. Br. at 6-8. The Employer argues that these three payments are not wages earned for work at Logistec, but rather are payments Mr. Haggerty received for service on the board of Coastline Terminal and therefore the three payments are not properly included in calculating Mr. Haggerty's wages. Emp. Br. at 7-11. During this same period the wage records submitted by the parties show that that Mr. Haggerty earned \$122,835.06 for work at Logistec, excluding the three payments at issue. EX 2, CX 1 and 2.

In resolving this issue it is necessary to determine whether the three payments in question constitute wages Haggerty earned for work at Logistec. A comparison of the wage records for the Claimant and the records for Mr. Haggerty under the new payroll system begun on April 4, 2004 reveal that most of the payments to both individuals identify the source of the payment as "Reg Hours", "Reg", "OT" and "Other". EX 1 at 1-3; EX 2 at 1-3.<sup>12</sup> Payments listed under the heading "Other" were made to both the Claimant and Mr. Haggerty on the following dates April 8, 2004 (EX 1 at 1 Stetzer, EX 2 at 1 Haggerty), July 8, 2004 (EX 1 at 1 Stetzer, EX 2 at 1 Haggerty), October 7, 2004 (EX 1 at 2 Stetzer, EX 2 at 2 Haggerty), January 13, 2005 (EX 1 at 3 Stetzer, EX 2 at 3 Haggerty).<sup>13</sup> One of the payments reflected under the "Other" column in the new payroll system is at issue, the payment of \$4500 on October 14, 2004. EX 2 at 2. The records from the payroll system in existence prior to April 4, 2004 also include payments that are not associated with hours worked. Two of those payments, the payment of \$6750 to Haggerty on September 18, 2003 and the payment of \$4500 on February 5, 2004 are also in question. CX 3; EX 2 at 11-12.

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regard is the law of the case and an accounting of wages covering this period is not properly before me. To the extent that the Claimant contends herein that wages covering the period through March 28, 2002 are properly at issue, he is mistaken.

<sup>11</sup> The Employer contends that the Claimant's wages for the period March 29, 2002 through January 20, 2005 total \$104,104.60 however, my calculations indicate he earned \$103,752.49 over this period. The Claimant did not provide a figure for this period as he was calculating the lost wage based upon a longer period of time.

<sup>12</sup> Mr. Atwood reported that Logistec instituted a new payroll system as of April 4, 2004. The reports generated by the new payroll system are included in EX 1 at 1-3 and EX 2 at 1-3 and the reports generated from the payroll system in use prior to April 4, 2004 are included as EX 1 at 4-11 and EX 2 at 4-13. CX 8 at 11.

<sup>13</sup> In addition to these four payments, in other instances payments made under the heading "Other" were made either to the Claimant or to Haggerty but not to both. For example, on June 10, 2004 a payment in the "Other" column was made to Haggerty and not to the Claimant ( EX 1 at 1 and EX 2 at 1), on September 30, 2004 a payment in the "Other" category was made to the Claimant and not to Haggerty (Ex 1 at 2 and EX 2 at 2). Mr. Atwood stated that these payments did not represent payment for hours worked and he suggested they were production incentives as they were paid quarterly. CX 8 at 13-15, 25-26.

Mr. Haggerty received payments on the following dates, September 17, 2003 (\$6750), February 5, 2004 (\$4500), and October 14, 2004 (\$4500), for a total of \$15,750. EX. 2 at 2, 11-12. Mr. Stetzer did not receive comparable payments on those three dates. EX 1 at 2, 4-5. The payments made to Haggerty on these three dates are the only payments in dispute between the parties. Cl Br. at 7-8; Emp. Br. at 7-11.

A careful review of the evidence shows that on September 18, 2003 Mr. Haggerty received a payment of \$472.69 for 21.50 hours. EX 2 at 11. On September 17, 2000, Mr. Haggerty also received a payment of \$6750. *Id.* It is noteworthy that no hours are recorded for the payment of \$6750. *Id.* The wage record reflects that on September 18, 2003 the Claimant received a payment of \$410.08 for 19.50 hours. EX 1 at 4. The Claimant did not receive a payment on September 17, 2003. *Id.*

On February 5, 2004 Mr. Haggerty received two payments. The first payment for \$851.97 was for hours worked 10.00, 21.50 and 1.00. EX 2 at 12. The second payment Mr. Haggerty received on that date was for \$4500 and did not include any hours worked. *Id.* On February 5, 2004 the Claimant received one payment of \$567.17 for the following hours, 19.50, 4.00, 1.00. EX 1 at 4,5.

On October 14, 2004, Mr. Haggerty again received two payments. The first for \$450 was not associated with hours worked. EX 2 at 2. The second payment Mr. Haggerty received on that date was for \$650.67 representing 23 regular hours and 5 overtime hours. *Id.* As for the Claimant, he received only one payment on October 14, 2004. The Claimant received \$590.49 for 18.50 regular hours and 5 overtime hours. EX 1 at 2.

The question that must be resolved is whether these three disputed payments to Mr. Haggerty were for work he performed for Logistec. Darrell Atwood, the Director of Safety and Health for Logistec was deposed by the Claimant regarding the wage records. Mr. Atwood testified that he did not prepare the wage records and that he simply delivered them. CX 8 at 10. Mr. Atwood also testified regarding Logistec's relationship with Coastline Terminals. CX 8. Mr. Atwood stated that Logistec leases property from Coastline Terminals and that Coastline supplies labor to Logistec. CX 8 at 6-8, 16-17. He reports that Coastline is an employee owned company. CX 8 at 8. The parties have acknowledged that Mr. Haggerty is an officer of Coastline in addition to working for Logistec. CX 8 at 27-29, 30-31. Mr. Atwood testified that he was not certain whether the wage records he provided were Logistec or Coastline run records or a combination of both. CX 8 at 26-27, 35. Mr. Atwood stated at one point that he believed the wage records he produced for the Claimant and Mr. Haggerty may have been generated from Coastline records. CX 8 at 15-16, 26-27. He stated that if the wage records were Coastline records they could very well include payments for services to Coastline that had nothing to do with Logistec. He offered an explanation that the wage records were Coastline run and that the payments to Haggerty on the dates in question September 17, 2003, February 5, 2004 and October 14, 2004, may reflect work he did for Coastline under the position he held on Coastline's board. CX 8 at 26-27, 29-30.

In my view, the Claimant did not establish that the three payments to Haggerty, which are in question, are wages earned for work at Logistec. The Claimant bears the burden of establishing

the Claimant's wage loss. On the face of the wage documents it is not clear that the documents represent only Logistec records and Mr. Atwood's testimony on this point was confusing. Additionally based upon the documents, it is not clear that the payments at issue were made to Haggerty for work performed for Logistec as the payments are not associated with a specific number of hours worked. Mr. Atwood was the only person who testified regarding the wage records and he could not identify the three payments made to Haggerty as wages. He testified both that he did not know what the payments at issue were for and then later he suggested the three payments may have been payments to Mr. Haggerty for work done on behalf of Coastline Terminal as a member of its board. The evidence demonstrates that Mr. Haggerty was on the board of Coastline Terminal an employee owned company. There was no evidence that the Claimant serves on the Board of Coastline. At most the Claimant demonstrated that there was a lack of clarity regarding the entries recorded in the wage records, e.g. payments under the "other" column in the wage records after April 2004 are not associated with hours worked and similarly the wage records prior to April 2004 include payments not associated with hours worked. The wage records on their face are not sufficient to establish that the three payments \$6750, \$4500 and \$4500 to Mr. Haggerty that are at issue were payment for wages for work at Logistec. In view of the evidence of record, I can not find that the three payments totaling \$15,750 paid to Mr. Haggerty constitute wages for work performed for Logistec. Accordingly, the three payments are not included in the calculation of Mr. Haggerty's wages for the period March 29, 2002 to January 20, 2005.

Consequently, Mr. Stetzer's wages during the period March 29, 2002 through January 15, 2005 were \$103,752.49. During this same 146 week period, Mr. Haggerty earned \$122,836.06 from work at Logistec. The difference is \$19,082.57 for a wage loss of \$130.70 per week and a compensation rate of \$87.13 per week for this period. Thus, the Claimant is owed compensation in the amount of \$12,720.98 for this period.<sup>14</sup>

The Claimant is also entitled to ongoing temporary partial disability compensation benefits for the remainder of the five year period provided for in Section 8(e) of the Act. The Claimant argues that for this ongoing period beginning on January 21, 2005, he seeks an award of weekly benefits based upon the amount of wage loss determined for the period March 29, 2002 through January 15, 2005. Cl. Br. at 8-9. The Employer agrees that the Claimant is entitled to ongoing benefits for temporary partial disability. Emp. Br. at 11. However, the Employer argues that the more recent figures show that the difference between the Claimant's wages and those of Mr. Haggerty, have been decreasing over time and that the ongoing award should be for an amount less than the award for the period March 29, 2002 through January 15, 2005. Emp. Br. at 11-12. The Employer argues that beginning with the third quarter of 2003 the quarterly difference in wages had decreased with the exception of the second quarter of 2004 where Mr. Haggerty earned \$314.33, substantially more than the Claimant earned. *Id.* at 12-13. The Employer suggests, therefore, that the ongoing award ought to be based upon the third and fourth quarters of 2003 and the first, third and fourth quarters of 2004, excluding the second quarter of 2004. *Id.*

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<sup>14</sup> The following calculation is used to arrive at the compensation rate ( $\$19,082.57 \div 146 = \$130.70$  wage loss per week and  $2/3$  of  $\$130.70 = \$87.13$  per week compensation benefit. The total amount due for this period is \$12,720.98 ( $\$87.13 \times 146$ )



The Employer has not offered a reasoned explanation for excluding the second quarter of 2004 in its suggested formula, for calculating wage loss for the ongoing benefit, except that Mr. Haggerty earned significantly more than the Claimant. Excluding the second quarter from the Employer's suggested formula results in a decrease in the Claimant's wage loss over the period. Such a decrease is unwarranted, as a fair comparison of the Claimant's wages over the entire six quarters shows that he earned significantly less than Mr. Haggerty. In addition, the wage records show that the wage differential has varied over the last three years. For example, in 2002 Haggerty earned \$478.81 more than the Claimant. In 2003 Haggerty earned \$460.12 more than the Claimant and in 2004 Haggerty earned \$533.09 more than the Claimant. EX 4 at 9.<sup>15</sup> The variation in wage differential is moderated if the wage loss is calculated considering the wage differential over a longer period. I conclude that calculating the ongoing compensation benefit by including wages over a longer period of time results in the most accurate and fair assessment of the Claimant's wage loss. Accordingly, I conclude that the Claimant is entitled to ongoing temporary partial disability compensation benefits based upon the wage differential for the period March 29, 2002 through January 15, 2005 of \$130.70 for a weekly compensation benefit of \$87.13.

### **C. Is the Claimant Entitled to A Penalty Pursuant to Section 14(f)**

Section 14(f) of the Act provides that if compensation, payable under the terms of an award, is not paid within 10 days after it becomes due, there shall be added to the unpaid compensation a penalty of 20% of the unpaid compensation. 33 U.S.C. 914(f). The Claimant argues that he is entitled to a penalty on all unpaid and past due benefits to the present based upon Judge Sutton's Order of August 11, 2003. CL. Br. at 9-10. The Employer asserts that a penalty cannot issue as Judge Sutton's Order did not establish a precise or definite dollar amount for the ongoing compensation benefit. Emp. Br. at 5-6.

In [\*Severin v. Exxon Corp.\*, 910 F.2d 286, 289 \(5th Cir. 1990\)](#), the Fifth Circuit stated that in order to constitute a "final decision and order" of the ALJ, an order must at a minimum specify the amount of compensation due or provide a means of calculating the correct amount without resort to extra-record facts which are potentially subject to genuine dispute between the parties. *See also Ledet v. Phillips Petroleum Co.*, 163 F.3d 901 (5<sup>th</sup> Cir. 1998). The Court determined that an order which stated that Exxon shall receive credit for all compensation previously paid and any wages paid to the claimant during the period specified, but which did not specify the amount of the wage credit or the manner in which to calculate it, was not a final decision and order. *Severin*, 910 F.2d at 289.

In the present matter, Judge Sutton's Order directed that from March 29, 2002 and continuing for a period not to exceed the remainder of the five year period contemplated by Section 8(e) of the Act, the Claimant was entitled to ongoing temporary partial disability compensation benefits "in an amount equal to two-thirds of the difference between the Claimant's actual earnings and those received by Daniel Haggerty..." CX 6 at 14. Judge Sutton's Order anticipated that the parties would compare the wages of the Claimant and Mr. Haggerty on a weekly basis. As the wages earned by either the Claimant or Mr. Haggerty could vary depending upon hours worked each week, the amount of the Claimant's wage loss could also vary. In order to calculate the

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<sup>15</sup> Contrary to the Employer's argument, the wage records show that the wage differential has increased over time.

Claimant's ongoing wage loss, the parties would of necessity have to consult extra record facts. Indeed, in the matter before me, the parties disputed the amount of Mr. Haggerty's wages and were unable to agree on the amount of the Claimant's wage loss. Thus, I conclude that it was not possible to determine the amount of compensation due without consideration of extra record facts. Accordingly, under these circumstances, a penalty is not appropriate.<sup>16</sup>

In addition, the Claimant waited more than one year before he attempted to obtain a default or enforcement of Judge Sutton's Order. The Board vacated an award of a penalty in a case where the claimant waited fifteen months to initiate default proceedings. *Shoemaker v. Scchiavone & Sons, Inc.*, 20 BRBS 214, 218 (1988). Under the circumstances herein, I find that a penalty is unwarranted.

#### **D. Compensation Due**

Based on the foregoing findings, the Claimant is owed temporary partial disability compensation pursuant to Section 8(e) of the Act from March 29, 2002 to January 15, 2005 in the amount of \$12,720.98. The Claimant is also entitled to ongoing temporary partial disability compensation pursuant to Section 8(e) of the Act, from January 16, 2005 and continuing for a period not to exceed the end of the five year period contemplated by Section 8(e), at a rate of \$87.13 per week, based upon a wage loss of \$130.70 per week when his wages are compared to those of Daniel Haggerty. The Employer is entitled to a credit for the temporary partial compensation benefits previously paid.<sup>17</sup>

#### **E. Interest**

Since compensation was not timely paid in this case, I find that the Claimant is entitled to interest on his unpaid compensation. *Foundation Constructors v. Dir.*, OWCP, 950 F.2d 621, 625 (9th Cir.1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 as of the filing date of this Decision and Order with the District Director.

#### **F. Attorney Fees**

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d 933, 937 (2nd Cir. 1976). The Claimant's attorney is permitted 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized

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<sup>16</sup> In making this determination, I am not concluding that compensation awards which require payment based upon two-thirds of the difference in wages earned by a claimant and those of a non-injured employee, must fix a definite amount. However, compensation awards that do not fix a definite award may not support a penalty.

<sup>17</sup> The record indicates that the Employer has paid \$14,998.39 for benefits due through June 10, 2004. CX 5. Thereafter, the parties are in disagreement as to the amount of compensation benefits paid on a weekly basis, \$83.60 or \$85.53. Cl Br. at 4; Emp. Br. at 4. Neither party submitted documents or other evidence from which the Court could make a determination on this point.

fee petition as required by 20 C.F.R. § 702.132, and the Respondents will be granted 15 days from the filing of the fee petition to file any objection.

#### **IV. ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Employer, Logistec of Connecticut, Inc., and Carrier Signal Mutual Indemnity Association, shall pay to the Claimant, Richard Stetzer, temporary partial disability compensation pursuant to Section 8(e) of the Act, 33 U.S.C. 908(e), for the period March 29, 2002 to January 15, 2005 in the amount of \$12,720.98, and from January 16, 2005 to the present and continuing for a period not to exceed the five years provided in the Act, in an amount equal to two thirds of the difference between the Claimant's actual earnings and those received by Daniel Haggerty for the period March 29, 2002 through January 16, 2005, for a wage loss of \$130.70 per week and a for a weekly benefit of \$87.13, subject to a credit for benefits previously paid;
2. The Employer shall pay to the Claimant interest on all past due compensation benefits at the applicable Treasury Bill rate pursuant to 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid, and the appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director;
3. The Claimant's attorney shall file an itemized fee petition within 30 days of the issuance of this order, and the Employer shall have 15 days thereafter to file any response;
4. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

**SO ORDERED.**

**A**

**COLLEEN A. GERAGHTY**  
Administrative Law Judges

Boston, Massachusetts